No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION.

The trial court had jurisdiction under an indictment, charging a conspiracy to commit offenses against the United States of America, to-wit: violations of the Second War Power Act. (Title 50 U. S. C.A., Section 633.)

STATEMENT OF CASE.

Frank Laurent, the appellant, with six other persons, was indicted by the Grand Jury for the Northern District of California, Southern Division, on the first day of March, 1944. All of the persons indicted, with the exception of the appellant, pleaded guilty. The appellant having pleaded not guilty went to trial on the 2nd day of May, 1944, in the Southern Division

of the United States District Court for the Northern District of California, and was by the jury convicted on the 3rd day of May, 1944, and was sentenced to serve a term of two years in a penitentiary and to pay a fine of $5,000.00. (Tr. R. pp. 15-16.)

Appellant moved the trial court for a directed verdict of not guilty at the conclusion of the Government's case, which motion was denied. (Tr. R. pp. 47-48.)

Appellant moved the trial court for a directed verdict of not guilty at the conclusion of all of the evidence in the case, which motion was denied. (Tr. R. pp. 63-64.)

Appellant moved the trial court for a new trial upon various grounds, amongst which were that the verdict is contrary to the evidence; that the verdict is not supported by the evidence; and that the evidence adduced at the trial is insufficient to justify the verdict. (Tr. R. pp. 64-65.)

Appellant moved the court in arrest of judgment upon various grounds, including that the evidence was insufficient to support the verdict and that the evidence was contrary to law, which motion was denied. (Tr. R. p. 66.)

The assignment of errors was filed by appellant within the time set by the trial court. (Tr. R. pp. 19, 20, 21, 22 and 23.) The bill of exceptions was settled and allowed by the court within the time fixed by the trial court. (Tr. R. pp. 68-69.)

SUMMARY OF THE EVIDENCE.

The appellant, who is engaged in the garage business, at 740 Post Street in the City and County of San Francisco, was at all times referred to in the indictment as engaged in the retail sale of gasoline to the general public, in connection with his garage business.

On the 16th day of February, 1944, an investigator for the Office of Price Administration went to the home of Russell Youmans, named in the indictment in this case as a defendant, where the said agent took from Youmans a quantity of C-2 gasoline coupons, which were counterfeit, and also $10,472.00 cash, lawful money of the United States. (Tr. R. p. 26.) That on or about the 10th day of February, 1944, Percy Newford, also named in the indictment as a defendant and co-conspirator, while playing cards in a Russian Tea Room on Geary Street, received a telephone call from an acquaintance by the name of George Allen, who stated that he, Allen, had a customer for him, Newford. That shortly thereafter the said Allen and appellant appeared at the Russian Tea Room and, according to the testimony of Newford, appellant said that he desired to purchase from Newford C-2 gasoline coupons and that Newford responded that he did not want to have anything to do with it, but after further conversation took from his person forty sheets of C-2 gasoline coupons, which he gave to the appellant and for which appellant paid Newford $600.00. Newford further testified that the C-2 coupons which

he sold to Laurent were received by him from his co-defendant Youmans. (Tr. R. pp. 33-34-35-36.)

While it was established that the coupons referred to were counterfeit, it is conceded by the Government, and in fact was proven by Government witnesses, that appellant did not know of their counterfeit character (Tr. R. p. 46) and, while it was shown that many of the C-2 coupons returned by appellant for gasoline sold were similar to those obtained from Newford, Newford further testified that he sold similar coupons to other persons. (Tr. R. p. 35.)

It was established that appellant, like other persons engaged in the sale of gasoline, was allotted a limited quantity of gasoline each month and that the demand of purchasers was far greater than his supply. (Tr. R. p. 55.) It was further established that appellant neither before nor after the finding of the indictment in this case knew, met or talked with any of the defendants, save and except the defendant Newford, as above related. (Tr. R. pp. 52-53.)

The appellant testified unequivocally that he never purchased gasoline coupons from Newford; that he did meet Newford at the Russian Tea Room and was taken to the Russian Tea Room by one George Allen, who told him that Newford had an automobile for sale and appellant, being a dealer in used cars, was interested. That this incident was on or about the 10th day of February, 1944; that he had never theretofore met George Allen; that Allen walked into appellant's garage and asked for "Frank" and appel-

lant said "I am Frank"; that Allen thereupon asked the appellant if he was interested in purchasing a used car. When appellant replied in the affirmative, Allen stated that he would introduce him, the appellant, to the man who desired to sell the car. Allen thereupon asked appellant to accompany him to the Russian Tea Room; Newford was not present when they called and they returned later on the same day, when appellant was introduced to Newford by Allen. (Tr. R. pp. 52-53.) All of the foregoing testimony was corroborated by Allen, who, after introducing the parties, removed himself from their presence. (Tr. R. pp. 57-58.) Appellant states that Newford thereupon made no mention of a desire to sell his automobile, but did solicit appellant to purchase gasoline coupons from him, Newford, but appellant told Newford that he had no need for coupons for the reason that he did not have sufficient gasoline to supply the demands made upon him and that there was no transaction between them. (Tr. R. p. 54.)

George W. Allen testified that he was a frequenter of a Russian Tea Room on Geary Street in San Francisco, where he became acquainted with Percy Newford, who said that he had an automobile for sale and that he told Newford that he knew a man who might be interested in purchasing his car. He, Allen, thereafter made inquiry of a grocer who operates a store on the corner of Post and Leavenworth Streets, where he, Allen, traded; that he related to the grocer that he had an automobile for sale and the grocer directed

him to "Frank" who operates the Post Street Garage; that he, Allen, thereupon entered the Post Street Garage and approached appellant and stated he wanted to see "Frank". (Tr. R. pp. 57-58.) Appellant stated that he was Frank and Allen thereupon told him that he represented the owner of an automobile who desired to sell a car and asked appellant if he was interested and appellant thereupon replied in the affirmative and the visits to the Russian Tea Room and the meeting with Newford were testified to by Allen, as above set forth in the testimony of appellant.

Several persons were called to the witness stand who claimed to be owners of automobiles whose license numbers were identical with those appearing on some of the gasoline coupons appearing on the sales records of appellant and in each instance said witnesses testified that they had not purchased gasoline in the establishment of appellant. (Tr. R. pp. 36-37-38-39-40-41.)

Captain Thomas B. Foster, for many years in charge of the United States Secret Service District and for the last six years Supervising Agent of the Fourteenth District of the Secret Service, testified that he made an examination of the C-2 gasoline coupons in evidence in this case to ascertain whether they were genuine or counterfeit and he found that some of them were counterfeit and others were genuine. (Tr. R. pp. 45-46.) However, the witness further testified that their counterfeit character was not readily discernible by a layman and as a matter of

fact an enforcement officer of the OPA that handled such stamps would not readily know them to be counterfeit. (Tr. R. p. 46.)

SPECIFICATIONS OF ERRORS RELIED UPON.

It is the contention of appellant that the trial court erred in admitting the testimony of the witness Frank Brush, who testified that on the 16th of February, 1944, he visited the home of Russell Youmans and there secured 1258 sheets of C-2 gasoline coupons, as well as $10,472.00 in cash. Appellant was not present at this meeting between Brush and Youmans, nor was any evidence offered to establish the existence of a conspiracy at that time. Notwithstanding that the testimony of the witness and the exhibits, being 1 and 2, respectively, were hearsay and in no way binding upon appellant, they were admitted over appellant's objection.

We submit that the trial court erred in denying appellant's motion to strike the testimony of the witness Brush at the conclusion of the Government's case, said testimony being purely hearsay and not binding upon the defendant, no conspiracy having been established.

We hold that the trial court erred in denying appellant's motion for an advised verdict at the conclusion of the Government's case, for the reason that no evidence of a conspiracy was introduced during

the course of the trial. All that can be said in this regard is that a man by the name of Youmans had in his possession counterfeit C-2 gasoline coupons; that a man by the name of Newford had similar coupons, which he claimed he obtained from Youmans and some of which he, Newford, claimed that he sold to appellant, as well as to other persons.

If the testimony of Newford is accepted as true, it is obvious that appellant was not a party to a conspiracy, for Newford claims that when appellant sought to purchase the coupons Newford declined to deal with him, but that upon further urging upon the part of appellant, yielded to appellant's persuasions and sold him forty sheets of coupons.

We further contend that if the testimony of the witness Newford is accepted as true, appellant would be guilty of the substantive offense but not of conspiracy.

It is well settled that the elements of a criminal conspiracy are a combination or agreement by two or more persons to commit some offense against the United States and an overt act for the purpose of effecting the object of the conspiracy committed by one of the parties to the agreement or combination. In other words, there must first be an agreement between the parties—a unity of design and purpose to commit some offense against the United States. Such agreement having been completed, it is then necessary that some overt act, whether of itself lawful or un-

lawful, must be done in furtherance of the agreement or conspiracy and to effect the object thereof by one of the parties to the conspiracy or agreement.

U. S. v. Olmstead, 5 Fed. (2d) 721;
U. S. v. Munday, 186 Fed. 375.

While unquestionably the agreement or conspiracy may be established by circumstantial evidence, we submit that no evidence, whether direct or circumstantial, was offered, nor was any attempt made in the trial of this case to establish a conspiracy.

The evidence upon which appellant was convicted is essentially as follows:

Certain C-2 gasoline coupons and a substantial amount of cash was taken from Youmans, named as a co-conspirator. Newford, also a co-conspirator, sold C-2 gasoline coupons, similar to those taken from Youmans, to appellant. Newford secured the C-2 gasoline coupons that he sold to appellant from Youmans, whether he paid Youmans or not the record does not disclose. Before the purported sale, however, from Newford to appellant, it appears that an intermediary, to-wit, Allen, paved the way for a meeting between Newford and appellant and that upon appellant's solicitation to purchase, Newford declined to deal with him. We respectfully submit that not only does this evidence fail to establish appellant as a party to the conspiracy, but to the contrary tends to establish that he was not a party to the conspiracy, but rather one of many persons to whom Newford admits selling such coupons.

Nothing was offered to establish that a conspiracy existed; that any of the persons named in the indictment had entered into a combination or agreement, other than that which might be gathered from the opening statement of the prosecutor and the averments of the indictment itself, which are not evidence.

> "The scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment."
>
> *Terry v. U. S.,* 7 Fed. (2d) 28;
>
> *Ford v. U. S.,* 10 Fed. (2d) 339.

And further quoting from *Terry v. U. S.,* supra:

> "A conspiracy is not an omnibus charge, under which you can prove anything or everything and convict all the sins of a lifetime."

And in another case, decided in 1937, this Court said:

> "On the other hand, an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement."
>
> *Marino v. U. S.,* 91 Fed. (2d) 691 at 695.

To establish a case of conspiracy to commit an offense against the United States, where one or more of the parties do any act to effect the object of the conspiracy, the conspirator must himself do the act or authorize it to be done.

> *U. S. v. McClarty,* 191 Fed. 518.

NO OVERT ACT WAS COMMITTED.

Appellant being accused as a co-conspirator with Newford, the sale of coupons by Newford to appellant and the purchase by appellant of coupons from Newford of necessity cannot be considered an overt act.

It is well settled law that where a conspiracy exists an overt act by one of the parties thereto becomes the act of all and such being the case and Youmans and Newford and appellant being co-conspirators, the act of selling by Newford was the act of selling by appellant and the act of purchase by appellant was the act of purchase by Newford, and, obviously, appellant could not buy and sell to himself and such action by the co-conspirators was, therefore, not an overt act.

In *U. S. v. Sager,* 49 Fed. (2d) 725, several defendants were indicted for conspiring to offer and give a bribe to a juror and the court said at page 727:

> "This count alleges concert between several intended givers of a bribe and the intended taker of the same bribe. This concert of givers and plurality of agents are necessary elements in the substantive offense of agreeing to receive a bribe and of agreeing to give one. Where concert is necessary to an offense, conspiracy does not lie. There may not be a conspiracy founded on a crime to commit bribery between persons, one charged with the intended taking and several charged with giving the same bribe. Concert is always necessary to an agreement to take and to give a bribe; it is always necessary to an intended taking and an intended giving; and it is necessary to the receipt of a bribe and the giving of a bribe. United States v. Dietrich, 126 F. 664, 667 (C. C. Dist.

Neb.); United States v. N. Y. Central R.R., 146 F. 298 (C. C. S. D. N. Y.) In the Dietrich case, Judge Van Devanter said: 'Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses, defined in section 1781, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving, or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another. The rule stated by Wharton (2 Cr. L. No. 1339) is applicable here.' ''

And Mr. Justice Stone declared:

"An indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity."

U. S. v. Katz, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986.

"It is well recognized that, in a crime such as bribery, where the participation of at least two persons is necessary and concert of action is essential to the offense, an indictment will not lie charging a conspiracy to commit such offense."

U. S. v. Burke, 221 Fed. 1014-1015.

In *U. S. v. Peoni,* 100 Fed. (2d) 401, the facts briefly are as follows: The defendant was charged with conspiring to possess counterfeit money. The defend-

ant sold counterfeit bills to one Regno and Regno sold the same bills to one Dorsey. All of the parties knew that the bills were counterfeit. Peoni, having been convicted, appealed to the United States Circuit Court of Appeals for the Second Circuit and in reversing the conviction Mr. Justice Hand said:

> "Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills for Ragno paid for them. At times it seemed to be supposed that, once some kind of a criminal concert is established, all parties are liable for everything any one of the original participants does, and even with what those do who join later. Nothing could be more untrue. Nobody is liable for conspiracy except for the fair import of the concerted purpose or agreement as he understands it."

Finally we cite the following:

> "Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy."
>
> *U. S. v. Falcone,* 311 U. S. 204, 85 L. Ed. 128.

CONCLUSION.

We respectfully submit that the evidence is wholly insufficient to support appellant's conviction and that the judgment of conviction should be reversed.

Dated, San Francisco, California,
November 8, 1944.

Respectfully submitted,
WALTER H. DUANE,
Attorney for Appellant.